

CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 341.

FREDERICH HOENINGHAUS AND HENRY W. CURTISS,
APPELLANTS,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 2, 1898.

(16,926.)

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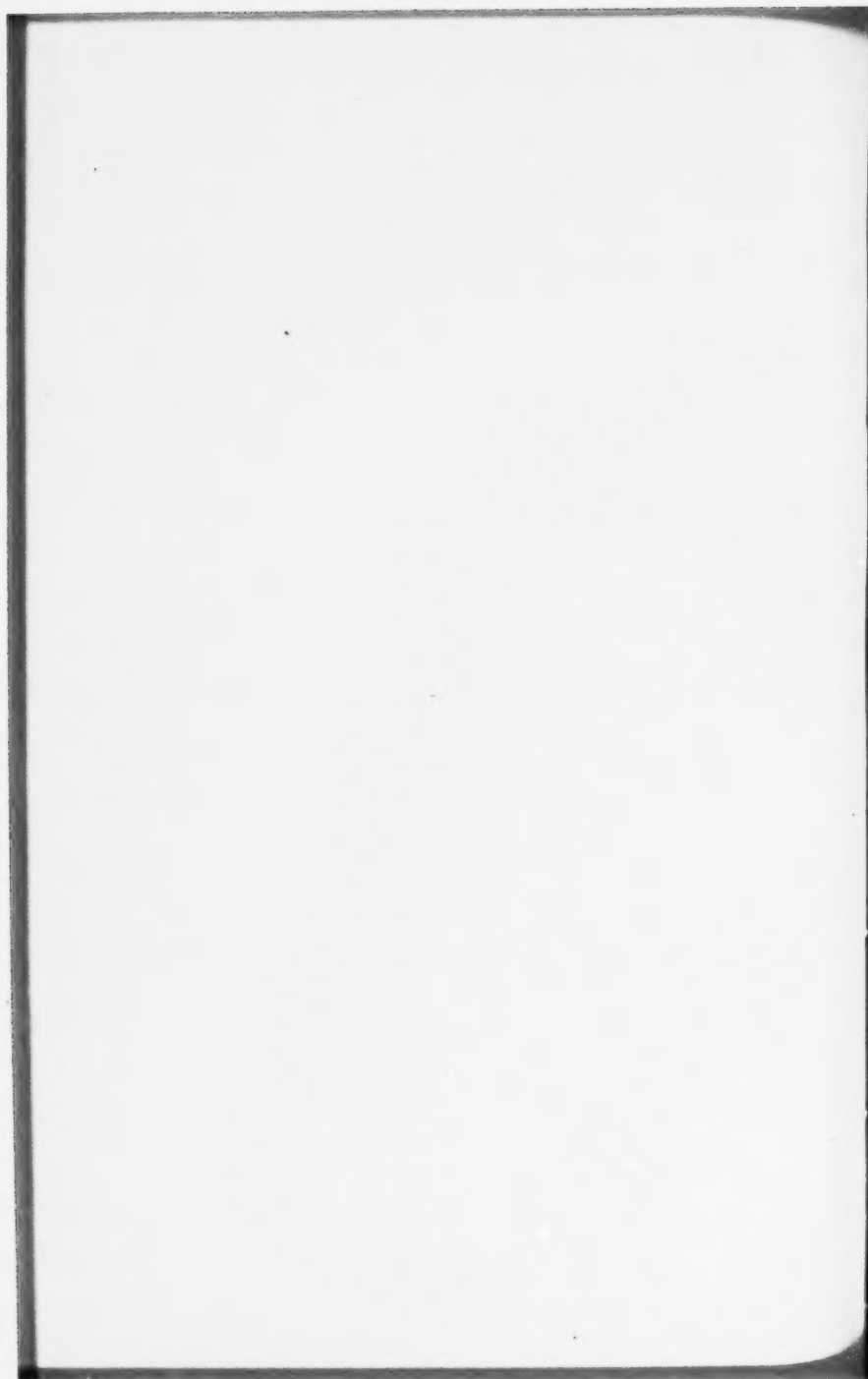
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INDEX.

	Original.	Print.
Certificate for instructions.....	1	1
Statement of facts.....	2	1
Questions certified.....	8	5
Clerk's certificate.....	9	5



1 United States Circuit Court of Appeals for the Second Circuit.

FREDERICH HOENINGHAUS and HENRY W. CURTISS,	} Suit No. 2702.
Appellants,	
vs.	
THE UNITED STATES, Appellee.	

Certificate for Instructions.

To the Supreme Court of the United States :

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 7th day of April, 1898, by which it was ordered, adjudged, and decreed that there was error in the decision of the board of general appraisers in this cause, and that said decision be, and the same is hereby, in all things affirmed, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, Frederick Hoeninghaus and Henry W. Curtiss, composing the firm of Hoeninghaus & Curtiss, and the cause having been placed upon the calendar of this court and reached for argument, and the record therein having been printed and filed, from which it appears that certain questions of law therein are involved, concerning which this court desires the instruction of the Supreme Court of the

United States, the following facts, from which the said questions arise, are herewith submitted and certified as follows :

2 First. Certain merchandise, consisting of woven fabrics in the piece, composed of silk and cotton, was imported from a foreign country into the port of New York by the appellants per S. S. La Gascogne, and entered for consumption on September 15th, 1897. The merchandise was returned by the appraiser as manufactures of silk and cotton in the gum, silk under 20 per cent., and was classified and assessed for duty by the collector of customs at said port at the rate of 50 cents per pound, under paragraph 387, Schedule L, of the tariff act of July 24th, 1897, which reads as follows :

"Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound ; if containing more than twenty per centum and not more than thirty per centum in weight of silk, if in the gum, sixty-five cents per pound, and if dyed in the piece, eighty cents per pound ; if containing more than thirty per centum and not more than forty-five per centum in weight of silk, if in the gum, ninety cents per pound, and if dyed in the piece, one dollar and ten cents per pound ; if dyed in the thread or yarn and containing not more than thirty per centum in weight of silk, if black (except selvages), seventy-five cents per pound, and if other than black, ninety cents per pound ; if containing more than thirty and not more than forty-five per centum in

weight of silk, if black (except selvages), one dollar and ten cents per pound, and if other than black, one dollar and thirty cents per pound;

3 if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black (except selvages), one dollar and fifty cents per pound, and if other than black, two dollars and twenty-five cents per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, three dollars per pound; if in the gum, two dollars and fifty cents per pound; if boiled off, or dyed in the piece, or printed, three dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, two and one-half dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if boiled off, three dollars per pound; if dyed or printed in the piece, three dollars and twenty-five cents per pound; if weighing not more than one-third of an ounce per square yard, four dollars and fifty cents per pound; but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem."

Second. On the last item of the invoice the appraiser made an addition of fcs. .09 per meter to make market value, making the appraised value exceed the value thereof declared in the entry.

Third. The merchandise had been entered at the invoice value, and in the liquidation of the entry on November 8th, 1897, the collector of the port levied an additional duty of 1 per centum of the total appraised value for each 1 per centum that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 32 of the act of July 24th, 1897, which reads as follows:

4 "That sections seven and eleven of the act entitled 'An act to simplify the laws in relation to the collection of the revenues,' approved June tenth, eighteen hundred and ninety, be, and the same are hereby, amended so as to read as follows:

SEC. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the

appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular

article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further, that all additional duties, penalties or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

Fourth. On November 18th, 1897, the following protest was filed by the appellants, importers, at the custom-house, at New York:

NEW YORK, *November 18th, 1898.*

Hon. George R. Bidwell, collector of customs, New York.

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on our importations below mentioned, consisting of certain merchandise contained in the cases or packages marked and numbered as described on the entries and invoices thereof; to which, for more certainty of description, reference is hereby had, claiming that as said merchandise, having regard either to its invoice, entered or appraised value, was not subject

to an ad valorem duty or to a duty based upon or in any manner regulated by the value thereof, but, on the contrary, *were* subject to specific duties, you had no right to levy any additional duty thereon under section 7 of the act of June 10th, 1890, as amended section 32 of the act of July 24th, 1897, and not at — as charged by you; and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods. We claim that the duty exacted by you is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

Vessel.	From—	Date of entry.	Entry No.	If wareh'ee, W. H. bond.	Date of liq'd'n.	Marks and numbers of packages.
Gascogne.....	Havre	1897. Sept. 15	148,047	C.....	1897. Nov. 8	A. S. 298 and others, as per invoices and entries.

7

HOENINGHAUS & CURTISS,
CURIE & SMITH,
Attorneys, # 33 and 46 Exchange Place, N. Y.

Fifth. The board of United States general appraisers, under the provisions of section 14 of the customs administrative act of June 10th, 1890, affirmed the decision of the collector, and held that said goods were properly subject to the additional duty imposed under section 7 of the customs administrative act of June 10th, 1890, as amended by section 32 of the tariff act of July 24th, 1897. The decision was made by a majority of the board of three general appraisers, one general appraiser dissenting.

Sixth. From this decision of the board of United States general appraisers the importers, appellants, appealed to the circuit court of the United States for the southern district of New York by petition praying for a review of said decision pursuant to section 15 of said act of June 10th, 1890, and the said circuit court upon said petition ordered the board of United States general appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon, and the said board of general appraisers thereafter made such return in response to said order of the court.

Seventh. The case thereafter came on to be tried upon the record returned by the board of general appraisers before Hon. William K. Townsend, district judge, holding the said circuit court, who after hearing argument directed the entry of judgment affirming the decision of the board of general appraisers; which judgment was entered on the 7th day of April, 1898, from which judgment
8 the present appeal was taken by the appellants, Frederich Hoeninghaus and Henry W. Curtiss, to this court. Upon these facts this court for the proper decision of said cause desires instruction upon the questions of law following—that is to say:

First. Under the provisions of par. 387 of the act of July 24, 1897, and sec. 7 of the act of June 10, 1890, as amended by sec. 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof?

Second. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in the entry, as applied to the particular article in said invoice undervalued, as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897?

And to that end this court hereby certifies such questions to the Supreme Court of the United States.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
N. SHIPMAN,
Circuit Judge.

9 UNITED STATES OF AMERICA, }
Second Circuit, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled Hoeninghaus & Curtis against The United States was duly filed and entered of record in my office by order of said court on the 24th day of June, 1898, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of New York, in the State of New York, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

10 [Endorsed:] # 2702. U. S. circuit court of appeals for the second circuit. Frederick Hoeninghaus and Henry W. Curtis, appellants, vs. The United States, appellee. Certificate for instructions. Curie & Smith, att'ys for appellants. # 46 Exchange

place, N. Y. city. United States circuit court of appeals, second circuit. Filed Jun- 24, 1898. William Parkin, clerk.

11 [Endorsed :] United States circuit court of appeals, second circuit. Hoeninghaus & Curtis *vs.* The United States. Certificate for instructions.

Endorsed on cover: Case No. 16,926. U. S. C. C. of appeals, 2nd circuit. Term No, 341. Frederich Hoeninghaus and Henry W. Curtiss, appellants, *vs.* The United States. (Certificate.) Filed July 2nd, 1898.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

FREDERICH HOENINGHAUS ET AL.	} No. 341.
<small>v.</small> THE UNITED STATES.	

MOTION TO ADVANCE.

STATEMENT OF FACTS.

On September 15, 1897, the appellees, constituting the firm of Hoeninghaus & Curtiss, imported into the United States and entered for duty at the port of New York certain silk and cotton piece goods. The collector classified these goods for duty under paragraph 387 of the tariff act of July 24, 1897, and the correctness of his classification is not disputed. The appraiser of the port, upon examination of the merchandise, added francs .09 per meter to make market value. *Upon the liquidation of the entry the collector assessed upon a portion of the merchandise a duty of 60 cents a pound and upon the remainder a duty of 50 cents a pound, under the provisions of paragraph 387.* He also assessed an additional duty by reason of the appraiser's advance under the provisions

of section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897.

The importers protested against the exaction of this additional duty, claiming (to quote the language of their protest), "that as said merchandise, having regard either to its invoice, entered or appraised value, was not subject to an ad valorem duty, or to a duty based upon or in any manner regulated by the value thereof, but, on the contrary, was subject to specific duties, you had no right to levy any additional duty thereon, under section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897." The collector transmitted the protest to the Board of General Appraisers, by whom it was overruled, one of the general appraisers dissenting. The importers thereupon brought the case into the United States circuit court for the southern district of New York on a petition for review, under the provisions of section 15 of the customs administrative act. The circuit court affirmed the decision of the Board of General Appraisers. An appeal was taken by the importers to the United States circuit court of appeals for the second circuit, and that court has certified the questions of law involved for the consideration and decision of this court.

STATUTES TO BE CONSTRUED.

Paragraph 387 of the tariff act of July 24th, 1897, provides as follows :

Woven fabrics in the piece, not especially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than

eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound; if containing more than twenty per centum and not more than thirty per centum in weight of silk, if in the gum, sixty-five cents per pound, and if dyed in the piece, eighty cents per pound; if containing more than thirty per centum and not more than forty-five per centum in weight of silk, if in the gum, ninety cents per pound, and if dyed in the piece, one dollar and ten cents per pound; if dyed in the thread or yarn and containing not more than thirty per centum in weight of silk, if black (except selvages), seventy-five cents per pound, and if other than black, ninety cents per pound; if containing more than thirty and not more than forty-five per centum in weight of silk, if black (except selvages), one dollar and ten cents per pound, and if other than black, one dollar and thirty cents per pound; if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black (except selvages), one dollar and fifty cents per pound, and if other than black, two dollars and twenty-five cents per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, three dollars per pound; if in the gum, two dollars and fifty cents per pound; if boiled off, or dyed in the piece, or printed, three dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, two and one-half dollars per pound; if weighing less than one and one-third ounces and more than one-third

of an ounce per square yard, if boiled off, three dollars per pound; if dyed or printed in the piece, three dollars and twenty-five cents per pound; if weighing not more than one-third of an ounce per square yard, four dollars and fifty cents per pound; *but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem.*

Section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897, reads as follows:

That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice, or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise, at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; *and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected,*

and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: *Provided further*, That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice

shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

THE QUESTION INVOLVED.

The question to be determined by this court upon the certification of the circuit court of appeals for the second circuit is whether, in view of the proviso at the close of paragraph 387, that "in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem," the silk and cotton piece goods imported by the appellees, which were subject to and upon which there was assessed specific duties of 50 and 60 cents per pound under paragraph 387 (such specific duties being more than 50 per cent of the appraised value), were "merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof" within the meaning of section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897, so as to render them subject to "an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry." The United States contends, and the board of appraisers and the circuit court have decided, that the goods were properly subject to such additional duty. The importers contend that the additional duty can not lawfully be assessed.

REASONS FOR ADVANCEMENT.

This cause is No. 341 upon the present docket, and it is reasonable to assume that, unless the court shall advance it, it can not be heard and decided until the winter of 1899-1900. The question involved is, so I am advised, constantly arising in the liquidation of entries at the port of New York and presumably elsewhere. Protests in large numbers are filed on behalf of numerous importers, raising the same contention as that involved in the present case. A considerable amount of money, the precise figures it is not practicable to state, is involved in the settlement of the question. Frequent reappraisements are occasioned by the Government's interpretation of the law, which would be unnecessary if the importers' contention as to the question certified here should be sustained. The provisions of law to be construed are in present and continuing operation, and an early settlement of the question by this court would simplify the administration of the customs laws, and would certainly expedite the public business by dispensing with the necessity of reappraisements if the importers' contention should be sustained by this court or of the accumulation and handling of protests if the Government's contention should be decided to be correct. A large number of importers are interested in the question and have urged the application for its speedy hearing and decision, and the Treasury Department is of opinion that it would be to the advantage of all concerned to have this question set at rest.

An oral argument of the case is desired, and it is believed it would throw light upon the subject and facilitate and lighten the labors of the court. The question

involved is comparatively simple and would not require lengthy discussion, and it is believed that an hour on each side would be more than ample for its presentation.

For the reasons above stated it is hoped that the court may set the case down for oral argument at an early date. This motion is made with the knowledge and concurrence of the appellees.

JOHN K. RICHARDS,
Solicitor-General.

WASHINGTON, *November 11, 1898.*



Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 341.

FREDERICH HOENINGHAUS and HENRY
W. CURTISS,
Appellants,

vs.

THE UNITED STATES.

The cause above entitled comes before this Court on a certificate for instructions from the U. S. Circuit Court of Appeals for the Second Circuit, and calls for the construction of a portion of Section 7 of the Customs Administrative Act of June 10th, 1890, as amended by Section 32 of the Tariff Act of July 24, 1897.

Statement of Facts.

The facts are so concisely stated in the record, which consists of only eleven folios, that it will not be practicable to abridge the statements therein contained to any great extent, but we shall attempt to make a brief summary of them.

On September 15th, 1897, appellants imported and entered for consumption at the port of New York certain woven fabrics in the piece composed of silk and cotton. Such fabrics were provided for in paragraph 387, Schedule L, of the Tariff Act of July 24th, 1897.

That paragraph is set out in full in the record (fols. 2 and 3), and it will be unnecessary to reproduce it here. It will be sufficient to state that it provides an elaborate scheme of specific duties for goods of this character, the rates varying from 50 cents to \$4.50 per pound, depending upon the weight of the fabric, the percentage of silk contained in it, its color, its mode of manufacture, &c. The paragraph concludes with a provision which reads as follows :

“ But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than 50 per centum *ad valorem*.”

The appraiser returned the merchandise as manufactures of silk and cotton in the gum, silk under 20 per cent. (Record, fol. 2). The entry was liquidated November 8th, 1897 (Record, fol. 3), and the collector assessed upon the merchandise a duty of 50 cents a pound under paragraph 387, above referred to.

On the last item of the invoice the appraiser made an addition of Fcs. .09 per meter to make market value. The merchandise had been entered at the invoice value, and this addition made the appraised value exceed the value declared in the entry (Record, fol. 3).

The duty of 50 cents a pound assessed by the Collector is conceded to be correct by appellants. But in addition to this duty the Collector levied an additional duty of one per cent. of the total appraised value for each one per cent. that said appraised value exceeded the value declared in the entry. It is this latter exaction which is contended by the appellants to have been unwarranted and illegal.

The provision of law under which it is sought to justify this exaction of additional duty (Section 7 of the Customs Administrative Act of June 10th, 1890, as amended by Section 32 of the Tariff Act of July 24th, 1897), is set forth in full in the record (fols. 4 and 5). It will be unnecessary to reproduce the whole

section here. The particular part thereof relied upon by the appellee is as follows :

“ And if the appraised value of any article of imported merchandise subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry.”

In due time the importers lodged a protest against the exaction of this additional duty, which protest is set forth in full in folio 6 of the record, the vital part thereof being as follows :

“ Claiming that as said merchandise, having regard either to its invoice, entered or appraised value, was not subject to an *ad valorem* duty or to a duty based upon or in any manner regulated by the value thereof, but on the contrary was subject to specific duties, you had no right to levy any additional duty thereon under Section 7 of the Act of June 10th, 1890, as amended by Section 32 of the Act of July 24th, 1897.”

The protest was transmitted to the Board of General Appraisers, and the decision rendered by a majority of that board affirmed the Collector's action. One general appraiser dissented (Record, fol. 7). His dissenting opinion will appear in the appendix to this brief.

On appeal the U. S. Circuit Court for the Southern District of New York affirmed the decision of the Board of General Appraisers. An appeal was thereupon taken to the Court of Appeals, and that Court has certified the case to this Court.

The Questions to be Decided.

The questions certified to this Court are as follows :

FIRST. Under the provisions of paragraph 387 of the Act of July 24th, 1897, and Sec. 7 of the Act of June 10th, 1890, as amended by Sec. 32 of the Act of July 24th, 1897, was the merchandise in suit subject to an *ad valorem* duty, or to a duty based upon or regulated in any manner by the value thereof ?

SECOND. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in the entry, as applied to the particular article in said invoice undervalued, as aforesaid, accrue according to the provisions of Section 7 of the Act of June 10th, 1890, as amended by Section 32 of the Act of July 24th, 1897 ?

POINTS.

I. The exaction of the additional duty is not justified by the language of the statute.

The fundamental error which underlies the contention of the appellee in this case is the assumption that the provision of Section 7, "subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof," relates to merchandise as a class or to particular kinds of merchandise as described in the various paragraphs of the Tariff Act, and that, if any merchandise is provided for or described in a paragraph of the tariff which contains a proviso whereby under certain circumstances or contingencies such merchandise as is described in the paragraph might become chargeable with an *ad valorem* duty, then,

whenever such merchandise as may be described in such a paragraph is imported and its value advanced by the appraiser, although such advance does not render it liable to an *ad valorem* duty, the Collector is justified in taking an additional duty under Section 7. But if the language of the provisions for additional duties be examined with care it will be seen that this is an utter misconception. The language is: "*if the appraised value of any article of imported merchandise subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise an additional duty of one per centum,*" &c. It is quite clear that this language does not refer to merchandise as a class, or to paragraphs of the Tariff Act, but to the particular article of merchandise imported. To justify the assessment of the additional duty the following facts must exist:

FIRST. An article must have been imported.

SECOND. It must have been entered.

THIRD. It must have been appraised.

FOURTH. The appraised value must exceed the entered value.

FIFTH. The article of imported merchandise must be subject to an *ad valorem* duty or to a duty based upon or regulated by its value.

It is the duty to which the merchandise is subject which is to be considered, and not the duty to which it might be subject if it were in some other condition or had some other appraised value. In other words, this statute is addressed to the collector when he comes

to liquidate the entry, and in effect says to him: "If you assess upon this merchandise an *ad valorem* duty or a duty based upon or regulated by its value, then you shall, if its appraised value exceeds its entered value, assess the additional duties provided for in Section 7. If, however, in liquidating the entry you impose upon the merchandise a duty which is not an *ad valorem* duty or which is not in any manner based upon or regulated by the value, the additional duty provisions of Section 7 have no application to such merchandise."

Merchandise generally or considered in the abstract has not an entered value nor an appraised value. Merchandise generally or considered in the abstract is not entered or appraised. Specific articles of merchandise are entered and are appraised, and unless such specific articles have imposed upon them *ad valorem* duties or duties regulated by the value, the inquiry whether the appraised value exceeds the entered value is immaterial.

The whole language of the paragraph shows this to be the correct construction. The beginning of the paragraph provides that, when the importer makes an entry of purchased goods he may make such addition in the entry to the invoice value as will in his opinion raise the same to the actual market value. And the proviso immediately following the language which the Court is now asked to construe makes this even more clear when it provides that "*the additional duty shall only apply to the particular article or articles in each invoice that are so undervalued*, and shall be limited to 50 per cent. of the appraised value of such article or articles. Thus it is clear that if a case on the invoice contains 10 pieces of silk woven fabric, each of a different number, quality, width, color or price, so that they are separately specified in the invoice, and one of them only is found to be undervalued, the additional duty could be imposed only on that one price, notwithstanding the articles were all silk woven fabrics in the piece and all to be classified and assessed under

paragraph 387. When this language is carefully analyzed and considered it must be perfectly clear that the language providing for the imposition of additional duty applies not to the class of merchandise or any sub-class or species of merchandise, but to the particular merchandise invoiced, entered and appraised, and *unless that specific merchandise is subject* (not might be subject, or could possibly have been subject) *to an ad valorem duty or to a duty based upon or regulated by its value, no additional duty can properly be imposed.*

It is an error to assume that the words "a duty based upon or in any manner regulated by the value thereof," necessarily refer to the provisos in various paragraphs of the Tariff Act declaring that the duty should not be less than a certain percentage *ad valorem*. The language not only does not necessarily mean this, but it does not mean this at all, and was not inserted for this purpose. It was inserted solely for covering merchandise which, while not subject to a certain percentage of duty to be multiplied by the value, was *subject to a duty which varied or was graduated according to its value per unit, such as a pound or square yard*. Instances of such provisions in the Tariff Acts of 1897 are as follows: Paragraph 128, providing for hoop iron; paragraph 135, providing for various articles of steel; paragraph 153, providing for pound duties on cutlery, according to value; paragraph 318, providing for cotton hosiery; paragraph 319, providing for cotton underwear; paragraph 366, providing for cloths and knit fabrics; paragraph 367, providing for blankets and flannels; paragraph 368, providing for women's and children's dress goods; paragraph 396, providing for printing paper, and many others. Any one of these paragraphs will serve for purposes of illustration. For example paragraph 367, which reads as follows:

"On blankets and flannels for underwear composed wholly or in part of wool, valued at not

more than forty cents per pound, the duty per pound shall be the same as the duty imposed by this Act on two pounds of unwashed wool of the first class, and in addition thereto thirty per centum *ad valorem*; valued at more than forty cents and not more than fifty cents per pound, the duty per pound shall be three times the duty imposed by this Act on one pound of unwashed wool of the first class, and in addition thereto thirty-five per centum *ad valorem*. On blankets composed wholly or in part of wool, valued at more than fifty cents per pound, the duty per pound shall be three times the duty imposed by this Act on one pound of unwashed wool of the first class, and in addition thereto forty per centum *ad valorem*. Flannels composed wholly or in part of wool, valued at above fifty cents per pound, shall be classified and pay the same duty as women's and children's dress goods, coat linings, Italian cloths and goods of similar character and description provided by this Act: Provided, that on blankets over three yards in length the same duties shall be paid as on cloths."

It was to insure the correct invoicing of such articles as these, where the value must in *every instance* be a factor in determining the rate of duty, and to prevent undervaluations of such goods from escaping additional duty, that the words were inserted "or to a duty based upon or in any manner regulated by the value thereof."

The latter part of the section now before the Court enforces the correctness of our contention as to the correct interpretation of the language. The section goes on to provide, "that if the appraised value of any merchandise [note that this language is broader than that which the Court is called upon to construe in this particular case] shall exceed the value declared in the entry by more than 50 per cent., except when arising

from a manifest clerical error, *such entry shall be held to be presumptively fraudulent*, and the collector of customs shall *seize such merchandise* and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure the undervaluation as shown by the appraisal shall be *presumptive evidence of fraud*, and *the burden of proof shall be on the claimant* to rebut the same, and *forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence*. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued." If this language is to receive the construction contended for by the appellee, then if one item in a case of merchandise upon which a purely specific duty is levied in the liquidation is advanced by the appraiser more than 50 per cent., although the undervaluation could not and does not affect the rate of duty, and, therefore, no evil intent can be or is imputed to the importer, the whole case must be seized, the transaction is presumptively fraudulent, and the Secretary of the Treasury is forbidden to remit the forfeiture, although the United States did not and could not lose a dollar by the transaction. Can the language of Congress receive such a judicial interpretation, involving such consequences, while there is any other rational and sensible interpretation which might be put upon it?

We submit that the only reasonable interpretation of Section 7, as amended, is that when, upon the liquidation of an entry, the Collector imposes in accordance with law upon the specific items of merchandise covered by and described in the entry *ad valorem* duties, or duties based upon or in any manner regulated by the value, then he shall, if those items of merchandise are undervalued, impose an additional duty of one per cent. for every one per cent. of under-

valuation, but that when the duties imposed upon the specific merchandise in accordance with law are purely specific duties, no additional duty can be imposed for undervaluation.

It is, of course, conceded by appellants that where the Appraiser's advance is such as to make a specific duty leviable under par. 387 less than 50 per cent., so that the merchandise becomes subject to and is assessed with a duty of 50 per cent. *ad valorem* under the proviso, the additional or penal duty attaches because the merchandise is then, in fact, subject to an *ad valorem* duty.

II.

The construction placed upon this paragraph by the Collector and Board of General Appraisers is contrary to the spirit and intent of the legislation.

In the case of *Passavant vs. U. S.*, 148 U. S., 214 (at p. 211), the Supreme Court says:

“As stated by Mr. Justice CAMPBELL, speaking for the Court, in *Bartlett vs. Kane*, 16 How., 263, 274, such additional duties ‘are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.’ *They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty.* It is wholly immaterial whether they are called additional duties or penalties.”

The same view has repeatedly been affirmed in other decisions of the Court and in opinions of the Attorney-

General. The object of the law is to secure correct valuations, and to punish fraud or negligence whereby the Government might suffer loss. No such loss can possibly occur where the goods, had they been entered at the appraised value, would nevertheless have been subject to purely specific duty. If an importer buys goods abroad at a foreign price equivalent to a dollar a pound, which goods are made by law subject to a duty of 75 cents a pound, with the proviso that the duty shall not be less than 50 per cent. *ad valorem*, he knows that the valuation of the goods is immaterial to the amount of duty unless the value should be found to be more than \$1.50 a pound. If his knowledge of the foreign market value is such that he knows of no such goods that have ever been sold for \$1.50 per pound or anywhere near it, and that on no conceivable theory could a competent appraiser appraise them as high as \$1.50 a pound, why should he be required to pursue an investigation and inquiry as to whether other foreign vendors ask \$1.02, \$1.04 or \$1.06 a pound? The goods would pay the same duty whether valued at \$1 or \$1.25 a pound. If a market value was a fixed, unvarying and notorious thing, such as a man could inform himself of in the same way as he would inform himself of the day of the week or the number of miles between two points on a map, it might not be much of a hardship to require him to have the mathematical market value in his invoice and impose a penalty on him if he did not have it. But a market value is not a fixed, unvarying and notorious thing, even where goods are publicly sold in one common mart or exchange, such as the wool market of Liverpool and the wheat market of New York and Chicago. Prices fluctuate from day to day and from hour to hour. Men who wish to keep posted as to the price of securities have to stand over a ticker. If Hoeninghaus & Curtiss bought silk goods from a manufacturer in Lyons or Roubaix, they could not tell without considerable inquiry what other manufacturers in these or other

places in France were asking for the same goods, even if it could be assumed that any other manufacturer sold precisely the same goods, which is very often far from being the case. The whole theory of the penalty or additional duty legislation is that it is a rough, harsh and more or less unjust attempt to prevent undervaluations whereby the revenue might suffer, and that, while hardship may result to the importer in individual cases, some strict requirement of this character is necessary to protect the revenue. But why should courts be asked to extend these harsh and cruel provisions of law to cases where they are not necessary to protect the revenue, but where, on the contrary, the revenue has not and could not suffer anything by the undervaluation? The word "undervaluation" is used simply for conciseness and brevity. It is really in many instances a misnomer. Goods are quite as often overvalued by the appraiser as they are undervalued by the importer. Advances to entered value made upon appraisement amount in many cases to a mere difference of opinion between the appraiser and the importer. Of course, the collection of the Government revenues requires that the opinion of the appraiser and not that of the importer shall be adopted in the liquidation. The additional duty the importer has to pay is in many instances the penalty of a difference of opinion between him and the appraiser. The peculiar cruelty and injustice of the present case consists in the fact that this penalty or additional duty is imposed upon the importers for *a difference of opinion with the appraiser on an immaterial point*, since whether the value be as he entered it or as the appraiser found it the duty assessable by law upon the goods is precisely the same.

The cruelty and injustice of the position contended for by the Government is increased by the change in the law, whereby a margin for difference of opinion between the appraiser and importer of 10 per cent. is wiped out, and every one per cent. of advance carries

with it one per cent. of additional duty. Section 7, as it read prior to the amendment made by Section 32 of the Tariff Act of July 24th, 1897, did not subject goods to additional duty for undervaluation unless the appraised value exceeded the entered value by 10 per cent.; whereupon an additional duty of two per cent. was levied for every one per cent. of undervaluation. The amendment makes the goods subject to additional or penal duties if there is any excess of the appraised value over the entered value, and makes the additional duty one per cent. for each one per cent. of advance instead of two per cent. It is harsh enough for the Government to say to the importer: "If our appraiser differs with you by one per cent. in your estimate of the market value of goods which are subject to *ad valorem* duties we will not only assess the *ad valorem* rate upon his valuation rather than yours, but we will impose upon you an additional duty of one per cent. for every one per cent. that his opinion differs from yours." But, if the contention of the Government in the case at bar is to be sustained, then its position is substantially this: "Mr. Importer, your goods are subject to a specific duty per pound or per yard; if their value had been appraised at 25 per cent. more than the value at which you entered them, they would still be dutiable at the same specific duty per pound or per yard. Whether the appraiser is right as to the value, or whether you are, is not of the slightest consequence in determining the duty leviable by law upon the goods. Nevertheless, for every one per cent. by which his estimate differs from yours, we will impose upon you an additional tax of one per cent."

It is matter of public knowledge that not only importers, but general appraisers and officers of the treasury protested against the entire abolishment of a margin for differences of opinion between the appraiser and the importer as to the valuation of *ad valorem* goods. If it is to be held that Congress meant by its

legislation not only to abolish any margin for difference of opinion, but to make goods not subject to any *ad valorem* duty become subject to a penalty or additional duty because of a difference of opinion between the appraiser and the importer as to their value, a point utterly immaterial in liquidation, then this legislation is unparalleled for cruelty and injustice in the history of this country. Such legislation would shock the moral sense, and nothing but the absolute impossibility of finding any other construction consistent with the language used should justify any Court in imputing such an intent to Congress.

III.

The construction of the statute contended for by the Government is contrary to public policy.

This is always a proper subject for consideration where there is any doubt as to the true construction of a statute. In the absence of the most imperative and unambiguous language, a construction should not be adopted which will lead to mischief and confusion. Such a result must inevitably attend the construction of the statute by the Collector and Board of General Appraisers.

One of these mischiefs will be a multiplicity of reappraisements. The general appraisers and the Board of General Appraisers will be repeatedly called upon to review the action of appraising officers in advancing values on goods paying specific duty. It would seem that there were quite enough reappraisements to tax the energy and industry of general appraisers on goods paying an *ad valorem* duty, without imposing upon

them the additional burden of holding reappraisements which can result in no change of the regular duties to which the merchandise is subject, solely for the purpose of determining what, if any, additional or penal duties can be imposed upon such merchandise. Suppose in the case at bar the importers had called for a reappraisement before one general appraiser, and ultimately by a board of three general appraisers, to determine whether the appraiser's advances were justified, the specific duty to which alone the goods were subject would in no wise be affected by these reappraisements. The general appraisers would be simply investigating the question whether or not these importers should be mulcted in a penalty. This would not be what they were doing in form, but it would really be the only practical question for them to decide. Can it be conceived that Congress intended that an appraising officer who is satisfied at once and without any doubt that the foreign value of merchandise is below the line which would bring it up to the *ad valorem* rate should go on investigating its market value and carefully determining the same, not because of any effect his determination might have upon the regular duty to which the goods were subject, but for the sole purpose of determining whether the importers could be mulcted in a penalty for undervaluation? Such a theory is inconsistent with the whole character and purpose of the revenue laws from the beginning of the Government.

The section of the law (Section 13) providing for reappraisement indicates clearly the contingency under which the law contemplated reappraisements. The section provides that the decision of the Appraiser shall be final as to the *dutiable value* of merchandise unless there is a reappraisement. In case of a reappraisement before one General Appraiser his decision is to be final as to the *dutiable value* of the merchandise unless there is a reappraisement before a board of three General Appraisers, in which case their decision is to be final as to *dutiable value*. The words

"dutiable value" mean the value upon which, or according to which, the rate of duty is to be assessed. Merchandise subject to specific duty has no dutiable value. Yet, if the appraiser's advances to the value of goods subject to purely specific duties is to carry with it the imposition of additional duty, of course, importers will be obliged to call for reappraisements in order to have the correctness of his decision reviewed. Merchandise is imported into the United States at many different ports. The General Appraisers are located at New York, and it is rarely that one of them is sent to other ports to hold reappraisements. The capacities of these officers are taxed to the utmost to hold reappraisements upon goods which pay duty according to their value. Surely a Court should hesitate to give a construction to the law which would impose upon them the additional burden of holding reappraisements upon goods which pay a purely specific duty.

Another mischief which will attend the construction of this statute against which we contend is the temptation to overvaluation and the consequent confusion attending the determination of market value. There is no penalty for overvaluing goods, except that, where the duty upon them is an *ad valorem* duty, duty cannot be assessed upon less than the entered or invoiced value. But if the goods are subject to specific duty there is nothing to prevent a merchant from invoicing or entering them at a higher price than their real value, in order to avoid the imposition of additional duty. Where the duty is specific, with a provision that it shall not be less than 50 per cent. *ad valorem*, an importer might escape all risk of additional duty by entering his goods at a much higher value than their real value, stopping just short of the point which would throw them into the *ad valorem* class. The result of this would be that *invoices supposed to represent actual transactions, which have always been the best evidence on which the appraiser could rely for information as to*

foreign value, would cease to be reliable. The consequence would be great confusion and uncertainty in the appraisement of merchandise.

The whole theory of the revenue system requiring invoices of goods purchased to be made out at the price actually paid, and invoices of goods consigned to state the actual market value, with the privilege to the importer, as to purchased goods, of making additions on entry if he thinks the price he paid is less than the market value, is based on the *importance to the correct appraisement of imports of having invoices and entries truly and correctly represent market values*, in order that the appraising officers, by comparing the entries and invoices of one importer with those of another, may arrive at accurate conclusions as to foreign prices. The law contemplates that these documents shall show foreign prices; *no less and no more*. Any system which will result in making these documents unreliable, in having them state fictitious and inflated values for the purpose of avoiding additional duties, is a public mischief and contrary to public policy. As to goods which pay duty according to their value, this mischief is prevented by the provision of law that duties shall not be assessed upon less than the invoice value; but, as to goods which do not pay duty according to the value, but according to their measurements or weights, there is nothing to prevent this mischief, and there will be everything to induce and encourage it, if, by resort to it, importers may escape the payment of additional duties or penalties on goods paying specific duties.

IV.

The construction of the statute now contended for by the appellee is contrary to previous rulings of the Treasury Department and of the Department of Justice.

The precise question involved in this case was submitted to the Attorney-General by the Secretary of the Treasury in 1878. The opinion of the Attorney-General is found in 15 Op. Att. Gen., 656. For convenience of reference a copy of it will be found in the appendix. It will be noted that the opinion refers to a previous ruling that merchandise paying a purely specific duty was not liable to the said additional or penal duty, although no distinction was made in terms by Section 2900 of the Revised Statutes between goods subject to an *ad valorem* duty and those subject to a purely specific duty. The opinion then goes on to show that the collector had contended in the case under consideration that, by reason of a proviso that "no brandies, spirits or other spirituous beverages under first proof, shall pay a less rate of duty than 50 per centum *ad valorem*," and of the fact that the brandy was below the degree of first proof, it was not absolutely subject to a purely specific duty. This, it will be observed, is the same contention that is now made here by the appellee. The Attorney-General then notes the fact that "notwithstanding the advance in value the brandy was liable only to the specific duty of \$2 a gallon." This makes the case precisely parallel with the case at bar. He then goes on to say :

"The undervaluations to which, in practice, the penalty of 20 per cent. has been applied have been, and for good reasons, such as were made in order to defraud the Government of revenue. This is not true of undervaluations of articles subject to a

specific tax, and therefore not of undervaluations of *brandy in general*; i. e., of any brandy, except such as, being under first proof, is also by appraisement worth more than four dollars per gallon."

Section 564 of the Treasury Regulations of 1884 was as follows:

"ART. 564. Merchandise paying a purely specific duty is not liable to the additional duty of 20 per cent. *ad valorem* imposed by Section 2900, Revised Statutes; but, if the specific duty is at all dependent upon value, as in the case of steel bars, which are dutiable at a certain sum a pound, according to the value of the steel, the additional duty attaches if the merchandise is advanced 10 per cent. or more. (S. 3335, 3370, 3483, 3519.)"

Substantially the same language is found in paragraph 894 of the Treasury Regulations of 1893.

In view of the fact that all these rulings were made under statutes which provided for the assessment of the additional or penal duty whenever "the appraised value of any article of imported merchandise shall exceed," &c., is it reasonable to contend that, when Congress inserted after the word "merchandise" the words "subject to an *ad valorem* duty, or to a duty based upon, or in any manner regulated by, the value thereof," they intended by this qualifying language to make the provision broader than it had been held to be before by the Treasury Department and the Department of Justice?

On the contrary, is not the inference irresistible that they wished to negative the claim that had been made under the Tariff Act of 1890, that the goods provided for in a paragraph containing a minimum *ad valorem* rate were subject to *ad valorem* duty on advance of valuation, notwithstanding the advance did not make them liable to other than specific duties?

V.

Any doubt as to the construction of the statute should be resolved in favor of the importer.

This salutary principle has been repeatedly affirmed by all the Federal Courts.

Adams vs. Bancroft, 3 Sumn., 387.
 U. S. vs. Wigglesworth, 2 Story, 373.
 Powers vs. Barney, 5 Blatch., 203.
 U. S. vs. Isham, 17 Wall., 504.
 Hartranft vs. Weigmann, 121 U. S., 616.
 Ross vs. Barland, 1 Peters, 667.
 Hedden vs. Iselin, 31 Fed. Rep., 269, top.
 American Net and Twine Co. vs. Worthington, 141 U. S., 468.
 McCoy vs. Hedden, 38 Fed. Rep., 89.
 Henderson vs. U. S., 26 U. S. App., 538.
 Matheson vs. U. S., 38 U. S. App., 25.

We know of no case in which it may be more properly invoked than the case at bar, where it is re-enforced as it is by every consideration of justice and sound public policy. The construction of the statute for which we contend is not only consistent with the letter of the law, but we submit that we have shown that any other construction is inconsistent with the spirit of the law and with public policy. The construction most favorable to the importer should therefore be adopted.

VI.

The questions certified should both be answered in the negative.

Dated New York, January 6th, 1899.

CHARLES CURIE,
 Attorney for Appellants.

W. WICKHAM SMITH,
 Counsel.

APPENDIX.

Opinion Attorney-General.

DUTY ON BRANDY.

The additional duty of 20 per centum *ad valorem*, which is imposed by section 2900, Rev. Stat., by way of a penalty for undervaluations, can have no application to an undervaluation of brandy where the brandy, being under first proof, is by appraisement worth not above four dollars per gallon.

DEPARTMENT OF JUSTICE,

FEBRUARY 9, 1878.

SIR—Yours of the 30th ultimo, addressed to the Attorney-General, states for his consideration the following case and questions :

“Messrs. Cook & Bernheimer imported into the port of New York one hundred cases of brandy, which was invoiced and entered at the custom house at a value of 20 francs per case, or about 9 francs per gallon. The appraiser reported that the strength of the brandy was below the degree of first proof, and that the correct value thereof was 24 francs per case. From this advance over the entered value an appeal was taken for reappraisement in the manner provided by section 2930 of the Revised Statutes. The value found on such reappraisement was 22 francs per case. This advance was 10 per cent. more than the invoice and entered value. The collector of customs thereupon, in addition to the regular duties, assessed a duty of 20 per centum *ad valorem* on said brandy under Section 2900, Rev. Stat., which provides that ‘when the appraised value

shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be collected a duty of 20 per centum *ad valorem* on on such appraised value.'

" The importers duly protested and appealed to this Department against the assessment of such additional or penal duty, claiming that brandy under the statute pays a specific duty, and that the case did not come within the provisions of the section of law above quoted.

" Although no distinction is made in terms by said section between goods subject to an *ad valorem* duty and those subject to a purely specific duty, this Department has heretofore held that merchandise paying a purely specific duty is not liable to the said additional or penal duty.

" The existing provisions of law on the subject will be found in Schedule D, Section 2504, Revised Statutes, and are as follows :

" 1st. ' Brandy, and on other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, \$2 per proof gallon. Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon.' * * * This was taken from the twenty-first section of the Act of July 14, 1870, and was in force on the 1st of December, 1873 ; and

" 2d. ' No lower rate or amount of duty shall be levied, collected and paid on brandy, spirits and other spirituous beverages than that fixed by law for the description of first proof, but it shall be increased in proportion for any greater strength than the strength of first proof ; and no brandy, spirits or other spirituous beverages under first proof shall pay a less rate of duty than 50 per centum *ad valorem*.' * * * This latter provision was taken from Section 2 of the Act of June

30, 1864, which imposed a duty of \$2.50 per gallon on brandy and spirits at proof and under, which rate was ~~appealed~~ by the Act of 1870 aforesaid.

"It is under the last clause that the collector of customs at New York took the ground that the brandy in question was not absolutely subject to a purely specific duty; but it may be stated that the brandy in question, notwithstanding its advance in value, was liable only to the specific duty of \$2 per gallon.

"The questions upon which your opinion is desired are: First, whether the duty of 50 per cent. on spirits, under first proof, is to be recognized as a legal one, in view of the provision in Schedule D, that each and every guage or wine gallon of measurement shall be counted as at least one proof gallon; and, second, if the validity of such duty shall be recognized, whether the 20 per cent. additional duty was properly assessed."

The practical construction by which the Act of 1870, cited above, was held, previously to the enactment of the Revised Statutes, to repeal the Act of 1864, upon the same subject, seems to have been probably correct. I say *probably*, because the question now before you renders it unnecessary to pronounce more definitely thereupon. If there were a repeal, it remains unaffected by the circumstances that *both* provisions have been brought forward into the Revised Statutes. For they are brought forward with the same effect as they had previously, *i. e.*, as being in conflict; that of 1870 remaining an expression of the latest will of Congress. The face of the record (in the Revised Statutes) still show as much as before (in the Statutes at Large) that the Act of 1864 had been repealed, and therefore that its reproduction is an inadvertence.

But it is unnecessary to decide absolutely that the Act of 1870 repealed that of 1864. For, if the *ad valorem* tax mentioned at the close of the language

quoted by you from Section 2504 has been applicable to any importations since the passage of the Act of 1870, it certainly has not been to an importation of a brandy which, when properly appraised, was worth no more than four dollars per gallon, which is the case of the brandy now in question.

The undervaluations to which, in practice, the penalty of 20 per cent. has been applied, have been, and for good reasons, such as were made in order to defraud the Government of revenue. This is not true of undervaluations of articles subject to a specific tax, and therefore not of undervaluations of *brandy in general*; *i. e.*, of any brandy, except such as, being under first proof, is also by appraisement worth more than four dollars per gallon.

I, therefore, answer the second question put by you in the negative. This, as I have before said, renders it unnecessary to say more about the first question.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

Dissenting Opinion by Tichenor, General Appraiser.

I am persuaded that, if Section 7 of the Act of June 10, 1890, as considered by the Court of Appeals in the Pings & Pinner case, had been the same as that now in force, and if the considerations of law, justice and public policy which have been brought to the attention of the board by the brief of counsel in this case had been presented to the Court, the conclusion in that case would have been different. In this view, I must

dissent from the conclusions reached by my colleagues in this case.

It is presumed that in framing the Customs Administrative Act of June 10, 1890, the Congress had in mind the then existing Tariff Act of 1883, which did not contain any provision like that under which this case arose; in other words, no provision to the effect that an article subject to a purely specific rate of duty per unit of quantity should not pay less than a certain rate *ad valorem*. That act provided in certain cases for mixed or compound rates, where the duty was based upon or regulated by the value, such, for example, as the duty on cotton thread and yarn (paragraph 318), where the specific rate per pound was dependent upon the value; also on cotton cloths (paragraphs 320 and 321), which were subject to an *ad valorem* rate if of certain specified values.

The question had been frequently raised whether the additional or so-called penal duty provided for in Section 2900 of the Revised Statutes was limited to merchandise subject to a purely *ad valorem* rate of duty, or included merchandise subject to mixed or compound or specific rates of duty, and whether the provisions of law in relation to market and dutiable value were applicable to merchandise where the specific rates imposed were dependent upon the value. The Treasury Department had repeatedly held (and this view was concurred in by the Attorney-General) that the additional or penal duty referred to did not apply to merchandise which had been assessed at purely specific rates.

The particular purpose of Section 19 of the Act of June 10, 1890, was to define the market and dutiable value of imported merchandise, and the use of the words "or to a duty based upon or regulated in any manner by the value thereof" was obviously for the purpose of making clear what had been before doubtful and the subject of dispute. It is assumed that these words were inserted in Section 7 of the act

by the amendment in Section 32 of the Act of July 24, 1897, for a like purpose. They necessarily imply that the additional or penal duty *is not applicable to merchandise subject to purely specific duty*, thus differing radically from the original section, considered by the Court in the Pings & Pinner case, where it was held that no distinction was made between merchandise subject to specific and *ad valorem* rates. This provision (Section 32 of the present act) does not refer to the *rate*, nor to *classes of merchandise*, but to the *duty* found to be due upon appraisement upon individual articles or particular importations of merchandise.

The duty levied and assessed in this case was *purely specific*; to wit, 50 cents per pound. That rate being equal to or in excess of 50 per cent. *ad valorem*, the condition upon which the *ad valorem* duty was contingent did not arise. Consequently, the merchandise did not become subject to a duty "based upon or regulated in any manner by the value thereof," any more than if paragraph 387, under which duty was assessed, had simply read:

"Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound."

As stated by Mr. Justice CAMPBELL, speaking for the Supreme Court, in *Bartlett vs. Kane* (16 How., 263, 274), such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." There can certainly be no just purpose in imposing an additional, exemplary or penal duty where, as in this case, no advantage is sought or secured, no evasion attempted or accomplished, and where the Government has not been

deprived of any portion of its lawful duties, nor injured in any way.

It has been held by the Attorney-General and the Treasury Department that the additional duty in question is a penalty (Treasury Synopsis 15,946). Whether it is or not, it seems to me that this is a case where the rule of construction that all doubts should be resolved in favor of the citizen and against the Government is peculiarly applicable (United States vs. Wigglesworth, 2 Story, 369; Net and Twine Company vs. Worthington, 141 U. S., 468, 474). A payment has been exacted from the protestants, by a summary process, in excess of the duties regularly prescribed by law, and irrespective of good or bad faith on their part.

I am of the opinion that the protest in this case should be sustained.

(Signed)

GEO. C. TICHENOR,
General Appraiser.



No. 341.



Ex. of Atty. Gen.

Filed Jan. 11, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

FREDERICH HORNINGHAUM AND HENRY

W. Curtis, appellants,

THE UNITED STATES.

No. 341.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

FREDERICH HOENINGHAUS AND HENRY W. Curtis, appellants, <i>v.</i> THE UNITED STATES.	} No. 341.
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*ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes into this court on the certificate for instructions from the circuit court of appeals for the second circuit. The facts set forth in the record are as follows :

The appellants imported certain merchandise, consisting of woven fabrics in the piece, composed of silk and

cotton, into New York, and entered the same for consumption on September 15, 1897. The merchandise was returned by the appraiser as manufactures of silk and cotton in the gum, silk under 20 per cent, and was properly classified by the collector for duty at 50 cents per pound under paragraph 387, Schedule L, of the tariff act of July 24, 1897 (30 Stat., p. 151).

On the last item of the invoice the appraiser made an addition of "0.09 franc per meter" to make market value, making the appraised value exceed the value thereof declared in the entry. The merchandise had been entered at the invoice value, and in the liquidation of the entry on November 8, 1897, the collector levied an additional duty of one per cent of the total appraised value for each one per cent that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, which requires such additional imposition in the case of an undervaluation of any merchandise "subject to an ad valorem duty or a duty based upon or regulated in any manner by the value thereof."

Paragraph 387 of the act of July 24, 1897, after providing for specific duties on woven fabrics in the piece, concludes with the proviso:

But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem.

The specific duties assessed by the collector were not less than fifty per centum ad valorem of the appraised

value. In view of this fact, the importers protested against the exaction of the additional duty, claiming the goods were not subject to an ad valorem duty or to a duty based upon or in any manner regulated by the value thereof, but, on the contrary, were subject only to specific duties.

The Board of General Appraisers (one general appraiser dissenting) overruled the protest and affirmed the decision of the collector, holding the goods were properly subject to the additional duty imposed. (For opinion, see Appendix.) The appellants applied to the circuit court for a review of the decision of the Board of General Appraisers, and the court affirmed the decision. From this action an appeal was taken to the circuit court of appeals for the Second circuit, which has requested instructions upon the following questions of law:

First. Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof?

Second. Did the additional duty of 1 per centum of the total appraised value of said merchandise for each 1 per centum that such appraised value exceeded the value declared in the entry, as applied to the particular article in said invoice undervalued, as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897?

THE STATUTES.

PARAGRAPH 387, SCHEDULE L, ACT JULY 24, 1897.

Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound; if containing more than twenty per centum and not more than thirty per centum in weight of silk, if in the gum, sixty-five cents per pound, and if dyed in the piece, eighty cents per pound; if containing more than thirty per centum and not more than forty-five per centum in weight of silk, if in the gum, ninety cents per pound, and if dyed in the piece, one dollar and ten cents per pound; if dyed in the thread or yarn and containing not more than thirty per centum in weight of silk, if black (except selvages), seventy-five cents per pound, and if other than black, ninety cents per pound; if containing more than thirty and not more than forty-five per centum in weight of silk, if black (except selvages), one dollar and ten cents per pound, and if other than black, one dollar and thirty cents per pound; if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black (except selvages), one dollar and fifty cents per pound, and if other than black, two dollars and twenty-five cents per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, three dollars per pound; if in the gum, two dollars and fifty cents

per pound; if boiled off, or dyed in the piece, or printed, three dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, two and one-half dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if boiled off, three dollars per pound; if dyed or printed in the piece, three dollars and twenty-five cents per pound; if weighing not more than one-third of an ounce per square yard, four dollars and fifty cents per pound; *but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem.*

SECTION 7, ACT JUNE 10, 1890, AMENDED BY SECTION 32, ACT JULY 24, 1897.

Sec. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition to the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise

than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an *ad valorem* duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient

evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further, that all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

ARGUMENT.

I.

Under the customs administrative act of June 10, 1890, all importations of merchandise must be accompanied with an invoice stating the cost or market value.

The third section provides that at or before the shipment of the merchandise the invoice shall be produced to the United States consul abroad, with a declaration indorsed thereon stating that, if the goods were purchased, it contains "the actual cost thereof," and if obtained in any other manner than by purchase, "the actual market value or wholesale price thereof at the time of the exportation in the principal markets of the country from whence exported."

The fourth section provides that no importation of any merchandise exceeding \$100 in dutiable value shall be admitted to entry without the production of the invoice,

or, if impracticable to produce it, an affidavit accompanied by a statement showing the actual cost of the merchandise, if purchased, or, if obtained otherwise, the actual market value or wholesale price thereof, etc.

The fifth section prescribes the forms of the declarations to be filed with the collector when the merchandise is entered by invoice. Where the merchandise has been actually purchased, the importer is required to state, on oath, the cost; where obtained otherwise than by actual purchase, the actual market value or wholesale price at the time of exportation in the principal markets of the country from whence imported.

It is in view of these provisions requiring the importer, upon entering the merchandise, to state its actual cost or market value, that Congress enacted the seventh section, the construction of which is now before the court. This section, as it now stands, amended by section 32 of the act of July 24, 1897, provides that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise in the principal markets of the country from which imported; but no such addition shall be made to the invoiced value of any imported merchandise obtained otherwise than by actual purchase.

The collector within whose district any merchandise is entered, whether the same has been actually purchased, or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any

article of imported merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per cent of the total appraised value thereof for each one per cent that such appraised value exceeds the value declared in the entry. The additional duty shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per cent of the appraised value of such article or articles.

Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from manifest clerical error, nor shall they be refunded in any case of exportation, or on any other account, nor shall they be subject to the benefit of drawback. The section further provides that if the appraised value of the merchandise shall exceed the value declared by more than fifty per centum, except when arising from manifest clerical error, the entry shall be held to be presumptively fraudulent, and the collector shall seize the merchandise and proceed to forfeit it by legal proceedings. Such forfeiture shall apply to the whole of the merchandise in any case or package containing the particular article undervalued.

The question before the court is whether an article subject primarily to a specific duty, but under the restriction and regulation that it shall not pay a less rate of

duty than fifty per cent ad valorem, is an article subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof, seeing that, in the particular instance under consideration, the specific duty under the classification made by the collector equaled or exceeded a duty of fifty per cent ad valorem. In other words, did the fact that the collector ultimately assessed only specific duties, take the article from the category of goods subject to a duty regulated in any manner by the value thereof.

In determining this question it is necessary to consider *at what time* does the imported article become "*subject to duty*." Is it at the time of the importation, when the goods are entered at the port, or is it at the time of liquidation, when the collector classifies the goods and assesses the duty? If an article is only subject to duty when the duty is ascertained by the collector and assessed, then the court must find in favor of the contention of the appellants, for the only duties assessed in this case were specific duties. But I take it that the time when the imported article is subject to duty is the time when it is imported—when it enters the port.

It is settled law that the right of the Government to the duties accrues when the goods have arrived at the proper port of entry. (*Mercedith v. U. S.*, 13 Pet., 486, 494; *U. S. v. Dodge*, Deady, 124; *U. S. v. Lyman*, 1 Mason, 482; *U. S. v. Lindsey*, 1 Gal., 365; *Waring v. The Mayor*, 8 Wall., 110, 120, and cases cited; *U. S. v. Cobb*, 11 Fed. Rep., 76, 79; *U. S. v. Boyd*, 24 Fed. Rep., 690; *McAndrew v. Robertson*, 29 Fed. Rep., 246.)

The invoice and declaration is required to be filed in view of a possible duty to be levied, not of an actual duty assessed. If the only possible duty is a specific duty, then the necessity for a true valuation by the importer does not exist. But if, under any contingency, the collector may be obliged to refer to the appraised value of the goods in order properly to classify them and assess and liquidate the duties under the statute, then a case exists where the goods are subject to a duty based upon or regulated in some manner by the value of the goods, and the necessity for a correct valuation by the importer exists.

The invoice value entered by the importer and the appraisement made by the Government are in view of something to be done, not of something which has been done. The thing to be done is the liquidation of the duties by the collector. If, in properly liquidating the duties, it is necessary for the collector to know the value of the goods—in other words, if the duties are not purely specific, but must be levied and assessed in view of the value of the goods—then you have a case where the goods are subject to a duty based upon or regulated in a certain manner by their value, and it is incumbent upon the importer to make a true valuation when he enters the goods. If he fail to do this, he omits at his peril a duty enjoined upon him by law, and he can not complain if he is made to suffer the consequences.

II.

It is contended by the importer that it is a great hardship to assess an additional duty on his goods, by way

of penalty for undervaluation, when in point of fact the duties assessed were not based upon the valuation but were purely specific. The statute was not framed, however, to meet each individual case, but to provide a general rule which would compel importers to deal honestly with the Government. I concede it seems hard in the case before the court to enforce the penalty, but if the case comes within the law, the hardship can work no exemption. The law vests no discretion in the collector.

If the appraised value of the article exceed the value declared in the entry, and the article is one subject to a duty based upon or regulated in any manner by the value thereof, the collector must levy and collect the additional duty of one per centum of the total appraised value of the article for each one per centum that such appraised value exceeds the value declared in the entry. In the case of *Passavant v. U. S.* (148 U. S., 214) the court, speaking by Mr. Justice Jackson, said (top page 221):

The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than ten per centum the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeded the value declared in the entry.

The rule requiring the importer to make a true and honest entry of the cost or market value of the goods he

imports is a general one and is necessary for the effective enforcement of the customs laws. It is not left to the importer to say whether he will or will not declare the value of the goods, or whether, if he declares the value, he shall make a true or false statement. He has no right to assume the responsibility of determining whether he will or will not make a statement, or whether, if he makes a statement, the statement shall be true or false. The law requires him to make a true statement. If he does not make a true statement, he might just as well make no statement. A false statement is worse than no statement.

Even in the case of goods free of duty, neither the importer nor the consul abroad can assume this fact and omit the invoice which states the cost or market value of the goods. The consular invoice is required whether the goods are free or dutiable. In fact, whether the goods be free or dutiable can not be determined except by the collector when he comes to classify the goods and liquidate the duties. Up to this time, the law must be complied with as if the goods were dutiable. This is for the purpose of furnishing the customs officers with all the facts so they may rightfully determine whether the goods are free or dutiable, and if dutiable, the proper duties to be assessed.

In the case of *U. S. v. Mosby* (133 U. S., 273), this court, speaking by Mr. Justice Blatchford, says, page 289:

It is entirely clear, that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty, is a question which could not be left to the determination of a consul. It often involves intricate points

of fact and of law, and must be as wholly cognizable by the proper officers and tribunals of the United States, appointed for the purpose, as the question of the proper rate of duty on dutiable goods.

So with respect to the case before the court. The question whether a specific duty or an ad valorem duty should be or would be levied could not be determined in advance by the appellants. The goods were subject to a duty regulated by their value. A duty at least equivalent to an ad valorem duty of fifty per centum had to be levied. To determine whether such a duty was levied it would be necessary for the collector to be truthfully advised of the value of the goods. The importers could not take the position, "we know the value of these goods, we know that a specific duty levied upon them will result in the goods paying a duty equivalent to a rate of fifty per centum ad valorem on their value, and therefore it is immaterial whether we make a true entry of their value or not." Since the duty to be assessed by the collector was dependent on the value of the goods, since it had to result in a rate which would be the equivalent of a duty of fifty per centum ad valorem on the value of the goods, the law made it incumbent on the importers to make a true and honest statement of the value of the imported goods. The necessity of such a statement must have been apparent even to the importers.

Of course in this case, where specific duties were ultimately assessed, it is not clear how the importers were benefited by the undervaluation. But a habit of undervaluation, if not stopped by the Government, would result in rendering null and void the concluding clause

of paragraph 387, to wit: "but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem." This closing provision of paragraph 387 can be effectuated in no other way than by insisting upon a true invoice and a correct appraisement.

After all, it is not clear that the importers have any just ground of complaint. Much is said by their counsel about the difference of opinion as to values between the importer and the appraiser, and how hard it is to compel the importer to pay a penalty because of such a difference of opinion. I submit it is not because of an honest difference of opinion that the importer is compelled to pay the penalty. These additional duties, as stated by Mr. Justice Campbell, speaking for the court, in *Bartlett v. Kane* (16 How., 263, 274), and quoted with approval in *Passavant v. U. S.* (148 U. S., 228), "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." "They are," as Mr. Justice Jackson added in the latter case, "designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character."

The broad rule applicable to every valuation, which may ultimately affect the classification of goods and the liquidation of duties, is necessary to discourage undervaluation and prevent fraud. Of this rule the importers had ample notice. It is not a question of a mere difference

of opinion. Congress has provided ample and elaborate means of testing and correcting differences of opinion. The action of the local appraiser is not conclusive. There might be an honest difference of opinion between him and the importer. The importer may, however, if dissatisfied with the action of the local appraiser, demand a reappraisement before a general appraiser, and if the result of this does not suit him, he may appeal to the Board of General Appraisers, whose action is final. Two reappraisements are afforded the importer before a valuation is conclusively reached.

Why should the importer complain of the levying of the additional duty in the case before the court more than in a case where an ad valorem duty was actually assessed? Was it not just as easy for the importer to make a true and accurate entry of the value of the goods in the present case as in the supposed case? The importer will concede that in the supposed case, if an ad valorem duty had actually been levied, and there had been a difference between the appraised value and the declared value, he would have no reason to complain of the assessment of the additional duty because of his undervaluation. If he knew that a true valuation was demanded in the present instance, could he not have complied with the law just as easily as if the goods were subject only to an ad valorem duty? If these particular goods had been a little more valuable, if they had been worth more than \$1 a pound, an ad valorem duty would have been levied upon them. Would it have been easier for the importer, if the goods had been worth more than

\$1 a pound, to make a true statement of their value than if they were worth less than \$1 a pound?

In short, it was just as easy in this case as in any case for the importer to make a true statement of the value of the goods. There were the same means provided by law for adjusting any differences of opinion and of affording the importer ample opportunity to secure a correct appraisement of his goods. Therefore, in levying the additional duty because of the undervaluation, there is no more hardship in this case than there would be if an actual ad valorem duty was imposed.

It is impossible to sustain the contention that there is unusual hardship in this case, except by insisting that the importer had a right to determine in advance whether a true statement was or was not necessary; to determine in advance whether the duties to be levied under paragraph 387 were to be specific or ad valorem; in other words, to substitute himself for the collector and on his own motion dispense with the law. He had no right to dispense with the law. He knew that the goods were subject to a duty regulated by their value. The duty was to be specific or ad valorem, according to the value of the goods, and therefore was a duty regulated by their value. Under these circumstances it was incumbent on him to make a true entry of the value of the goods. He did not do so. For his own purpose, he undervalued them. He did it at his peril, and he has no just ground to complain of the penalties which have inevitably followed.

III.

In the case of *Pings v. U. S.* (72 Fed. Rep., 260), the circuit court of appeals of the second circuit held that when the question whether goods are to pay a specific or an ad valorem duty depends on whether they exceed a certain value, an appraisement is essential, and, if the appraisement disclose that the goods have been undervalued more than ten per centum, they are subject to the penalty of an increased duty, although the excess over ten per centum on the invoice value is not sufficient to require an ad valorem instead of a specific duty.

For the convenience of the court I print as an appendix to my brief the full text of the decision in this case, the opinion being delivered by Judge Lacombe. Substantially the questions argued here were raised and decided in that case. In the *Pings Case*, the goods were gloves, subject to specific duties, with a concluding proviso "that none of the articles named in this paragraph shall pay a less rate of duty than fifty per centum ad valorem." It is true that, since the *Pings Case*, section 7 of the customs administrative act has been amended. At that time it read:

If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry.

The section now reads :

If the appraised value of any article of imported merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof, shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum, etc.

The additional language "subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof," has been inserted in section 7, so as to qualify the article of imported merchandise, which is subject to an additional duty in case of undervaluation. This qualifying language, however, was, before the amendment of the seventh section, present in the nineteenth section, which defines "actual market value or wholesale price," and the court, in the *Pings Case*, read section 19 in connection with section 7, so that what the court really considered and construed was section 7 as modified by section 19. It considered that the merchandise referred to in section 7, which is subject to an additional duty in case of undervaluation, is the merchandise described in section 19—that is, merchandise "subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof." This appears clearly from a reading of the opinion of Judge Lacombe, wherein, after stating the case, the provisions of the paragraph under which the gloves were classified, and the pertinent provisions of section 7, he says :

Section 19 of the same act provides for appraisement of value "whenever imported merchandise is

subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof."

Where duties are purely specific no appraisement is required, and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay a specific or ad valorem duty, appraisement is essential; and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties.

IV.

The stress laid by counsel for the importer upon the "cruelty and injustice" of construing the law so as to authorize the imposition of the additional duty in the case before the court may excuse a reference to certain decisions bearing upon the weight which courts may give to the plea of "hardship."

In the case of *The Queen v. Justices of Lancashire* (11 A. E., 157) Judge Patterson said:

I can not tell what consequences may result from the construction which we must put upon the statute, but if mischievous, they must be remedied by the legislature.

In the case of *Rhodes v. Smethurst* (4 Mees & W., 63) Lord Abinger said:

A court of law ought not to be governed or influenced by any notions of hardship; cases may require legislative interference, but *judges can not* modify the rules of law.

The idea that the judges, in administering the written law, can mold and warp it according to their notions—not of what the legislator said, nor even of what he meant, but of what in their judgment he ought to have meant; in other words, according to their own ideas of policy, wisdom, or expediency—is so obviously untenable that it is quite apparent that it never could have taken rise, except at a time when the division lines between the great powers of government were but feebly drawn and their importance very feebly understood. In the present condition of our political system this practice can not be acted on with either propriety or safety. (*Sedgwick on Const. St. Law*, 264.)

Where the law is clear the courts construe it as they find it. (*Amy v. Watertown*, 22 Fed. Rep., 218; *Raiser v. William Tell*, 39 Pa. St., 144; *Palmer v. Thatcher*, 3 Q. B. D., 353; *Fisher v. Harnden*, 1 Paine, 61; *Lake Co. v. Rollins*, 130 U. S., 670.) In the construction of a statute the courts can only declare what it is, not what it ought to be. (*Beatty Ex. v. United States*, Dev. Rep., 243.)

Mr. Justice Field, delivering the opinion of this court in the case of *Hadden v. The Collector* (5 Wall., 107), said:

What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons; it is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

In the case of *The United States v. The Trans-Missouri Freight Association* (166 U. S., 290) Mr. Justice Peckham, delivering the opinion of the court, said:

The public policy of the Government is to be found in its statutes, and when they have not strictly spoken, then in the decisions of the courts, and the constant practice of the Government officials; but when the lawmaking power speaks upon a particular subject, upon which it has constitutional power to legislate, public policy in such a case is what the statute enacts.

In the case of *United States v. Goldenberg* (168 U. S., 95) Mr. Justice Brewer, delivering the opinion of the court, said:

The primary and general rule of statutory construction is that the intention of the lawmaker is to be found in the language he has used; he is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. * * * No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for justifies any judicial addition to the language of the statute.

In the case of the *United States v. Geise* (83 Fed. Rep.), the court said:

We see no reason why the court should be astute to find some excuse for holding that Congress did not intend to say what it has said in positive and unambiguous language.

Revenue statutes are not laws founded upon any public policy. (*United States v. Wigglesworth*, 2 Story, 369;

Rice v. United States, 53 Fed. Rep., 910.) All tax laws are a bald exercise of power, to be literally obeyed. There is nothing equitable about such enactments. They are strict law, to be enforced accordingly. Their object is to afford revenue to the Government. (*Taylor v. The United States*, 3 How., 197.) This court has declared that the Government has nothing in view in such laws but the security of its own revenue. (*United States v. 60 Pipes of Brandy*, 10 Wheat., 421.) They do not fall within the rule that penal laws are to be enforced strictly in favor of those prosecuted under them. (*The United States v. 25 Cases of Cloth*, Crabbe, 386; *United States v. 28 Packages of Pins*, Gilp., 306.) The law under consideration is not a penal law. Section 7, as amended by section 32 of the act of 1897, expressly says that "such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided," etc.

V.

It is submitted that the questions certified should each be answered in the affirmative.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 9, 1899.

APPENDIX.

PINGS ET AL. v. UNITED STATES (72 FED. REP., 260).

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

This is an appeal from the decision of the circuit court, southern district of New York, reversing a decision of the Board of General Appraisers, which reversed a decision of the collector of the port of New York exacting a penal duty for undervaluation of certain kid gloves imported under the tariff act of 1890.

Stephen G. Clark, for appellants.

Henry C. Platt, for the United States.

Before Wallace, Lacombe, and Shipman, circuit judges.

Lacombe, Circuit Judge:

The rates of duty on gloves of the kind imported are prescribed in paragraph 458 of the act of October 1, 1890. It provides that:

Gloves of all descriptions, composed wholly or in part of kid or other leather * * * shall pay duty at the rates fixed in connection with the following specified kinds thereof, fourteen inches in extreme length * * * being fixed as the standard, and one dozen pairs as the basis, namely: Ladies' and children's Schmaschen of said length or under, one dollar and seventy-five cents per dozen; ladies' and children's lamb of said length or under, two dollars and twenty-five cents per dozen; * * *

ladies' and children's suedes of said length or under, fifty per cent ad valorem; all other ladies' and children's leather gloves and all men's leather gloves of said length or under, fifty per cent ad valorem; all leather gloves over fourteen inches in length, fifty per cent ad valorem. [Here follow other provisions for additional specific duties on other named varieties.] *Provided*, That all gloves represented to be of a kind or grade below their actual kind or grade shall pay an additional duty of five dollars per dozen pairs: *Provided further*, That none of the articles named in this paragraph shall pay a less rate of duty than fifty per cent ad valorem.

The importations in question are "ladies' and children's Schmaschen gloves, under fourteen inches in length." As such, they were dutiable at \$1.75 per dozen, unless their value exceeded \$3.50 per dozen, in which case they would be dutiable at 50 per cent ad valorem. The appraiser advanced their value in excess of 10 per cent of the value declared in the entry, and the propriety of this advance is not questioned. The appraised value, however, is not in excess of \$3.50 per dozen. The collector held the merchandise liable to the additional or penal duty prescribed by section 7 of the customs administrative act of June, 1890. The importer contends, and the board of general appraisers sustained his contention, that no penal duty should be exacted, because gloves of this kind and grade pay a specific duty, and because the advance, although in excess of 10 per cent, was not sufficient to require them to pay the ad valorem duty exacted by the last proviso of the paragraph above quoted.

Section 7 of the act of June 10, 1890, provides that the importer—

Of any imported merchandise which has been actually purchased may * * * when he shall make and verify his written entry of such merchandise * * * make such addition in the entry to the cost or value given in the invoice * * * as in his opinion may raise the same to the actual market value of such merchandise; * * * and the collector * * * shall cause the actual market value * * * to be appraised; and, if the appraised value of any article of imported merchandise shall exceed by more than ten per cent the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per cent of the total appraised value for each one per cent that such appraised value exceeds the value declared in the invoice, etc.

Section 19 of the same act provides for appraisement of value "whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof."

Where duties are purely specific no appraisement is required, and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential; and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties. We see no reason, therefore, for restricting the broad language of the statute, and

concur with the judge who heard the case in the circuit court, that "the statutes require that all imports be entered at fair value; and this provision for increasing duties for undervaluations of more than 10 per cent makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

The decision of the circuit court is affirmed.

OPINION OF BOARD OF GENERAL APPRAISERS.

(18746—G. A. 4059.)

Where certain silk and cotton goods, properly classified under paragraph 387 of the tariff act of 1897, are appraised at a value exceeding that declared in the entry, they are subject to the additional duty imposed by section 32 of said act (amendatory of section 7 of the act of June 10, 1890), although actually assessed only with duties purely specific. (Tichenor, general appraiser, dissenting.)

Pings v. United States (72 Fed. Rep., 260; s. c., 18 C. C. A. Rep., 557), followed.

Before the United States General Appraisers at New York, December 24, 1897.

In the matter of the protest, 26961f-10955, of Hoeninghaus & Curtis, against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain merchandise, imported per *La Gascogne*, and entered September 15, 1897.

Opinion by Somerville, General Appraiser.

The issue raised by the protest involves the construction of section 32 of the tariff act of July 24, 1897,

under the provisions of which the collector assessed certain so-called penal duties on the importation in question, consisting of goods composed of silk and cotton. These goods were assessed for duty at purely specific rates under paragraph 387 of said act, and no objection is raised as to the correctness of the classification or to the specific rates of duty assessed.

It appears that, in making an appraisement of the goods, the local appraiser made an addition of 0.09 franc per meter to the entered value in order to make market value, the appraised value of the merchandise being thus made to exceed the entered value by that much per meter. The collector thereupon, in the liquidation of the entry, assessed the additional duty prescribed by section 32 of said tariff act, which amended section 7 of the customs administrative act of June 10, 1890.

The importers claim that this additional duty was levied without authority of law, as the goods were assessed with and subject to only specific duties.

It is true the duties prescribed in said paragraph 387 generally are specific, and that in the case of this particular importation only specific and not ad valorem duties were assessed; but the following pertinent clause is added to said paragraph:

But in no case shall any of the foregoing fabrics in this paragraph pay *a less rate of duty than fifty per centum ad valorem*.

The whole question is whether these goods are "subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof," within the meaning of this phrase occurring in said section 32.

Whatever doubts we might otherwise entertain as to the construction of these provisions of the tariff act of 1897 must be set at rest by the decision of the circuit court of appeals (Second circuit) in the case of *Pings et al. v. United States* (72 Fed. Rep., 260; 18 C. C. A. Rep., 557).

Paragraph 458 of the tariff act of October 1, 1890, levied on leather gloves purely specific rates of duty, with the proviso (which is entirely analogous to that attached to said paragraph 387) that "none of the articles named in this paragraph shall pay a less rate of duty than fifty per cent ad valorem." The gloves there under consideration had been assessed only with specific duties. The court (per Lacombe, J.) in construing section 7, of the act of June 10, 1890, the one amended by said section 32 of the tariff act of 1897, and relating to additional or penal duties, used this language:

Section 19 of the same act (of June 10, 1890) provides for appraisement of value "whenever imported merchandise is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof."

Where duties are purely specific, no appraisement is required and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay a specific or ad valorem duty, appraisement is essential, and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties. We see no reason, therefore, for restricting the broad language of the statute, and

concur with the judge who heard the case in the circuit court that "the statutes require that all imports be entered at fair value," and this provision for increasing duties for undervaluations of more than 10 per cent makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not.

Following the principle of that decision it is our judgment that the protest must be overruled and the collector's decision (imposing the additional duties in question) affirmed, which is ordered accordingly.

H. M. SOMERVILLE,

CHARLES H. HAM,

Board of Classification of United States General Appraisers.

DISSENTING OPINION BY TICHENOR, GENERAL APPRAISER.

I am persuaded that, if section 7 of the act of June 10, 1890, as considered by the court of appeals in the Pings & Pinner Case, had been the same as that now in force, and if the considerations of law, justice, and public policy, which have been brought to the attention of the board by the brief of counsel in this case had been presented to the court, the conclusion in that case would have been different. In this view, I must dissent from the conclusions reached by my colleagues in this case.

It is presumed that in framing the customs administrative act of June 10, 1890, the Congress had in mind the then existing tariff act of 1883, which did not contain any provision like that under which this case arose;

in other words, no provision to the effect that an article subject to a purely specific rate of duty per unit of quantity should not pay less than a certain rate ad valorem. That act provided in certain cases for mixed or compound rates where the duty was based upon or regulated by the value, such, for example, as the duty on cotton thread and yarn (paragraph 318), where the specific rate per pound was dependent upon the value; also on cotton cloths (paragraphs 320 and 321), which were subject to an ad valorem rate, if of certain specified values.

The question had frequently been raised whether the additional or so-called penal duty provided for in section 2900 of the Revised Statutes was limited to merchandise subject to a purely ad valorem rate of duty, or included merchandise subject to mixed or compound or specific rates of duty, and whether the provisions of law in relation to market and dutiable value were applicable to merchandise where the specific rates imposed were dependent upon the value. The Treasury Department had repeatedly held (and this view was concurred in by the Attorney-General) that the additional or penal duty referred to did not apply to merchandise which had been assessed at purely specific rates.

The particular purpose of section 19 of the act of June 10, 1890, was to define the market and dutiable value of imported merchandise, and the use of the words "or to a duty based upon or regulated in any manner by the value thereof" was obviously for the purpose of making clear what had been before doubtful and the subject of dispute. It is assumed that these words were

inserted in section 7 of the act by the amendment in section 32 of the act of July 24, 1897, for a like purpose. They necessarily imply that the additional or penal duty *is not applicable to merchandise subject to purely specific duty*, thus differing radically from the original section, considered by the court in the *Pings & Pinner Case*, where it was held that no distinction was made between merchandise subject to specific and ad valorem rates. This provision (section 32 of the present act) does not refer to the *rate*, nor to *classes of merchandise*, but to the *duty* found to be due upon appraisement upon individual articles or particular importations of merchandise.

The duty levied and assessed in this case was *purely specific*, to wit, 50 cents per pound. That rate being equal to or in excess of 50 per cent ad valorem, the condition upon which the ad valorem duty was contingent did not arise. Consequently, the merchandise did not become subject to a duty "based upon or regulated in any manner by the value thereof," any more than if paragraph 387, under which duty was assessed, had simply read:

Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound.

As stated by Mr. Justice Campbell, speaking for the Supreme Court, in *Bartlett v. Kane* (16 How., 263, 274), such additional duties "are the compensation for a violated law, and are designed to operate as checks and

restraints upon fraud." There can certainly be no just purpose in imposing an additional, exemplary, or penal duty where, as in this case, no advantage is sought or secured, no evasion attempted or accomplished, and where the Government has not been deprived of any portion of its lawful duties, nor injured in any way.

It has been held by the Attorney-General and the Treasury Department that the additional duty in question is a penalty. (Treasury Synopsis, 15946.) Whether it is or not, it seems to me that this is a case where the rule of construction that all doubts should be resolved in favor of the citizen and against the Government is peculiarly applicable. (*United States v. Wigglesworth*, 2 Story, 369; *Net and Twine Company v. Worthington*, 141 U. S., 468, 474.) A payment has been exacted from the protestants, by a summary process, in excess of the duties regularly prescribed by law, and irrespective of good or bad faith on their part.

I am of the opinion that the protest in this case should be sustained.

GEO. C. TICHENOR,
General Appraiser.

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HOENINGHAUS *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 341. Argued January 11, 1899. — Decided January 30, 1899.

Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, the merchandise in suit, being certain woven fabrics in the piece composed of silk and cotton, was subject to an ad valorem duty or to a duty based upon or regulated by the value thereof.

An additional duty of one per centum of the total appraised value of such merchandise for each one per centum that such appraised value exceeded

Statement of the Case.

the value declared in the entry, as applied to the particular article in such invoice so undervalued, accrued according to the provisions of section 7 of the act of June 10, 1890, as amended by the act of July 24, 1897.

ON September 15, 1897, Frederick Hoeninghaus and Henry W. Curtiss imported, at the port of New York, certain woven fabrics in the piece, composed of silk and cotton. Such fabrics were provided for in paragraph 387, schedule *d* of the tariff act of July 24, 1897, which contains an elaborate scheme of specific duties for goods of this character, the rates varying from 50 cents to \$4.50 per pound, depending upon the weight of the fabric, the percentage of silk contained in it, its color, its mode of manufacture, etc.; and concludes with a provision which reads as follows: "But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than 50 per centum ad valorem."

The appraiser returned the merchandise as manufactures of silk and cotton in the gum — silk under 20 per cent; and the collector assessed upon the merchandise a duty of 50 cents a pound, under the paragraph above mentioned. On the last item of the invoice the appraiser increased the valuation made in the invoice to make market value, thus making the appraised value exceed the value thereof declared in the entry. Thereupon the collector levied an additional duty of 1 per centum of the total appraised value for each 1 per centum that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 32 of the act of July 24, 1897, which is in the following terms:

"That the owner, consignee or agent of any imported merchandise which has been actually purchased, may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition to the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the

Statement of the Case.

invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; *and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry*, but the additional duties only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further, that all additional duties,*

Statement of the Case.

penalties or forfeitures, applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

Thereupon the importers filed a protest, claiming that said merchandise, having regard either to its invoice, entered or appraised value, was not subject to an ad valorem duty or to a duty based upon or in any manner regulated by the value thereof, but on the contrary was subject only to a specific duty.

The board of general appraisers, under the provisions of section 14 of the act of June 10, 1890, affirmed the decision of the collector, and held that such goods were properly subject to the additional duty imposed under section 7 of the act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897.

From this decision of the board of general appraisers the importers appealed to the Circuit Court of the United States for the Southern District of New York, and after, in pursuance of an order of said court, the board of general appraisers had made a return of the record and proceedings before them, that court affirmed the decision of the board of general appraisers. From the judgment of the Circuit Court an appeal was taken to the Circuit Court of Appeals for the Second Circuit; and that court thereupon certified to this court the following questions of law:

"First. Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof?

"Second. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in

Opinion of the Court.

the entry, as applied to the particular article in said invoice undervalued as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897?"

Mr. W. Wickham Smith for Hoeninghaus. *Mr. Charles Curie* was on his brief.

Mr. Solicitor General for the United States.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The tariff legislation in question recognizes three classes of merchandise subject to duty. One is where the duties are purely specific, another where the duties are wholly based on valuation, and the third where the duties are "regulated in any manner by the value thereof."

All importations of merchandise must be accompanied with an invoice, stating the cost or market value. The third section of the act of June 10, 1890, c. 407, 26 Stat. 131, provides that all such invoices shall have endorsed thereon a declaration signed by the purchaser, manufacturer, owner or agent, setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof, and, when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported; that such market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade, in

Opinion of the Court.

the usual wholesale quantities; the actual quantity thereof; and that no different invoice of the merchandise mentioned has been or will be furnished to any one; that, if the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser.

The 7th section, as amended by section 32 of the act of July 24, 1897, provides that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise in the principal markets of the country from which imported; but no such addition shall be made to the invoiced value of any imported merchandise obtained otherwise than by actual purchase.

These and other provisions contained in the acts of June, 1890, and July, 1897, compel us to perceive the importance attached by Congress to the obligation put upon the importer to furnish the appraisers and the collector with a true valuation of the imported merchandise; and also the care taken to relieve the importer from a hasty or ill-considered valuation, contained in the invoice, by giving him an opportunity to raise such valuation by voluntarily making such addition thereto as to bring the same to the actual market value, and by providing for an appeal by the importer, if dissatisfied with the appraisement, to the board of general appraisers, and from the decision of the board to the courts.

The contention on behalf of the importers is, in effect, that there are only two classes of merchandise to be considered — one where the duties are purely specific, and where it is claimed no appraisement is required and none is made, and the other where the merchandise is subject to an ad valorem rate of duty; and that the merchandise in question in this case belongs to the former class.

Without deciding whether, even in the case of an importation of merchandise subject only to a specific duty it is lawful to dispense with an appraisement, our opinion is that, in find-

Opinion of the Court.

ing the duty properly assessable upon this merchandise, it was obligatory on the government officials to inquire into its value, and that therefore the duty was one regulated in some manner by the value thereof. The fact that it turned out, in the present case, that the goods did not pay a less rate of duty than fifty per centum ad valorem, did not relieve the appraiser from inquiring into and determining the value of the goods. And if it was the duty of the appraiser, in order to enable him to fix the duty, to inquire into the value of the imported merchandise, he was entitled to the aid afforded him in such an inquiry by the production of a true and correct invoice.

We cannot accept the contention of the importers that, where articles of merchandise are entered and appraised, the inquiry whether the appraised value exceeds the entered value is immaterial, unless, as a result of such inquiry, such articles have imposed upon them ad valorem duties.

The importers had no right to determine for themselves in advance whether a specific duty or an ad valorem duty should be levied. The duty was to be regulated by the value of the goods. A duty at least equivalent to an ad valorem duty of fifty per centum had to be levied, and to determine what duty was leviable it was necessary for the collector and appraisers to be truthfully advised of the value of the goods.

It is urged that, as specific duties were actually assessed in the present case, it therefore appears that the importers were not benefited by the undervaluation; that the revenue has not and could not suffer anything by the undervaluation; and that a mere difference of opinion between the importer and the appraisers, as to the value of the goods, should not subject the former to an additional duty.

But what might seem to be the hardship of such a case cannot justify the appraisers or the courts in dispensing with the requirements of the statutes. The meaning and policy of the tariff laws cannot be made to yield to the supposed hardship of isolated cases. Nor is it apparent that the enforcement of the statutory requirements can be justly termed a hardship to importers who take the risk of an undervaluation. The bur-

Opinion of the Court.

then of furnishing a true and correct invoice, in such a case, is no greater than that imposed on other importers where goods are confessedly within the category of goods subject to an ad valorem assessment.

The administration of such laws cannot be narrowed to a consideration of every case as if it stood alone, and as if the only question was whether there was an actual intention to defraud the government. Wide and long experience has resulted in the command that all importations of merchandise must be accompanied with a true and correct invoice, stating the cost or market value. Like other importers, the present appellants must comply with this command, and if they have failed to do so, they must be held to be subject to the additional duty imposed by the statute. If the statutory regulations are found to be too stringent, the remedy cannot be found either in the courts whose duty is to construe them, or in the executive officers appointed to carry them into effect, but in Congress.

We have been referred to no decision of this court directly applicable to the case in hand, but *Pings v. United States*, 38 U. S. App. 250, is cited. That was a case arising under the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, where gloves were imported into the port of New York and were dutiable at \$1.75 per dozen, unless their value exceeded \$3.50 per dozen, in which case they would be dutiable at fifty per centum ad valorem. The appraiser advanced their value in excess of ten per centum of the value declared in the entry, and the propriety of this advance was not questioned. The appraised value, however, was not in excess of \$3.50 per dozen. The collector held the merchandise liable to the additional duty prescribed by section 7 of the Customs Administration Act of June 10, 1890. The importer's contention, that the additional duty should not be exacted because gloves of the kind imported pay a specific duty, and because the advance, although in excess of the ten per centum, was not sufficient to require him to pay the ad valorem duty exacted by the last proviso of paragraph 458 of the tariff act of October 1, 1890, was sustained by the board of general appraisers. But the Circuit

Syllabus.

Court held otherwise, and on appeal the Circuit Court of Appeals for the Second Circuit affirmed the decision of the Circuit Court. The Court of Appeals, reviewing the provisions of the act of June 10, 1890, held that where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential, and that it is to be expected that the statute should require the importer himself to state the value of his goods faithfully and truthfully, and to enforce that requirement by appropriate penalties. The court said: "We see no reason for restricting the broad language of the statute, and concur with the Judge who heard the case in the Circuit Court, that the statutes require that all imports be entered at fair value, and that the provision for increasing duties for undervaluations of more than ten per centum makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

This case was under another statute, in somewhat different terms, but the reasoning upon which that decision went is that which we have pursued in the present case, and meets with our approval.

Our conclusion is that the questions certified to us by the Judges of the Circuit Court of Appeals should be answered in the affirmative, and it is so ordered.

MR. JUSTICE PECKHAM dissented.